

# Deprivations of Liberty: Mental Health Act or Mental Capacity Act?

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The provisions of the *Mental Health Act 2007*<sup>2</sup> (the 2007 Act) which amend the *Mental Capacity Act 2005* (MCA) so as to provide for a procedure that can be used to authorise the deprivation of the liberty of a mentally incapacitated person<sup>3</sup> are intended to sit alongside existing *Mental Health Act 1983* (MHA) powers. But the nature of the relationship between the two Acts is far from clear. This article suggests that the new MCA procedure could be very much the poor relation of the MHA.

## Guardianship

The Code of Practice on the MCA confidently asserts, at para.13.16, that guardianship cannot be used to deprive a person of their liberty. This is a commonly held opinion, but is it correct? The MHA, as amended by the 2007 Act, provides the guardian of a mentally incapacitated person with the following powers:

- a power to take the person to where he or she does not want to go, using force if necessary (MHA ss.18(7)<sup>4</sup> and 137).
- a power to insist that the person remains at that place (MHA s.8(1)(a)).
- a power to return the person to that place if he or she leaves without authority, using force if necessary (MHA ss.18(4), 137).
- a power to take the person to a place where he or she will receive medical treatment under the authority of the MCA (MHA s.8(1)(b), MCA ss.5,6).

Put bluntly, a person under guardianship can be forced to leave his or her home to go to a place where he or she does not want to go to, can be required to stay in that place and can be returned to that place if he or she leaves without being given permission to do so. Given the interpretation that the European Court of Human Rights and the High Court have given to the meaning of a deprivation of liberty<sup>5</sup>, how can it possibly be argued that a person who is subject to the operation of such powers is not being deprived of his or her liberty? Such a person is clearly subject to the continuous control of the guardian and is not

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2 The provisions of the Act which are referred to in this article are not yet in force.

3 See section 50 *Mental Health Act 2007*.

4 As inserted by Sch.3, para.3(5) of the 2007 Act.

5 See the discussion in the author's *Mental Capacity Act Manual*, 2nd ed, 2007, pp. 95–99.

free to leave the specified place of residence<sup>6</sup>. The fact that the provisions of the MHA that relate to guardianship do not specifically state that guardianship can be used to authorise the deprivation of a patient's liberty is not legally relevant to the question of whether the provisions can have that effect.

In *JE v DE (1) Surrey County Council (2) EW (3) [2006] EWHC 3459 (Fam)*, Munby J. held that the crucial issue in determining whether a mentally incapacitated person who is being cared for in a care home is being deprived of his or her liberty is not so much whether the person's freedom within the home is curtailed but rather whether or not the person is free to leave. His Lordship said<sup>7</sup> that the person concerned, who had not been received into the guardianship of the local authority, was not free to leave and "was and is, in that sense, completely under the control of the [local authority]", because it is the local authority who decides the essential matters of where he should live, whether he can leave and whether he can be with his wife. Guardianship would have provided the authority with the power to make such decisions. It follows from *DE* that if guardianship is being used to ensure that a person does not leave the place where he or she is required by the guardian to reside, it is being used to deprive that person of his or her liberty.

Does guardianship comply with Art.5 of the *European Convention on Human Rights*, which is designed "to ensure that no one should be arbitrarily dispossessed of his liberty"<sup>8</sup>? Guardianship is clearly a "procedure prescribed by law" for the purposes of Art.5(1) and the House of Lords has held<sup>9</sup> that Art.5(4), which provides that a person who has been deprived of his or her liberty must be entitled to take proceedings to challenge the lawfulness of the detention, is not breached by virtue of the fact that the person concerned lacks the mental capacity to institute such proceedings. It is also the case that the procedure for making a guardianship application under s.7 of the MHA meets the substantive and procedural requirements for the lawful detention of persons of unsound mind which were established by the European Court of Human Rights in *Winterwerp v Netherlands* (1979–80) 2 E.H.R.R. 387.

The Government could be faced with a compatibility issue under the Convention if a person who has been deprived of his or her liberty on the authority of a guardianship application makes an application to a Mental Health Review Tribunal. Subsequent to the decision of the Court of Appeal<sup>10</sup> which declared that ss.72(1) and 73(1) of the MHA were incompatible with Arts.5(1) and 5(4) because they placed the burden upon the patient to prove that the criteria justifying detention no longer exist, Parliament passed the *Mental Health Act 1983 (Remedial) Order 2001*<sup>11</sup> which placed the burden of proof on the detaining authority. As this Order did not reverse the burden of proof in s.72(4), which deals with applications made by guardianship patients, the Government would have to make a further remedial order to ensure that this provision is compatible with Art.5.

If guardianship can be used to deprive a person of his or her liberty, should it be used in preference to the new MCA procedure given that the Code of Practice on the MCA states, at para.13.20, that decision-makers "must never consider guardianship as a way to avoid applying the MCA"? The new MCA procedure is Byzantine in its complexity, but this factor alone would not provide a "cogent reason" for departing from the guidance in the Code<sup>12</sup>. However, the following factors do provide such reasons:

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6 *HL v United Kingdom* (2004) 40 E.H.R.R. 761, para.91.

7 See para.117.

8 *Shiesser v Switzerland* (1979) 2 E.H.R.R. 417,425.

9 *R (on the application of MH) v Secretary of State for Health* [2005] UKHL 60.

10 *R. (on the application of H) v Mental Health Review Tribunal, North and East London Region* [2001] EWCA Civ 415.

11 SI 2001/3712.

12 *R. (on the application of Munjaz) v Mersey Care National Health Service Trust* [2005] UKHL 58.

- There is a strong argument in favour of the contention that the statement in the Code that guardianship cannot be used to deprive a person of his or her liberty does not represent the true legal position.
- Guardianship provides a greater degree of protection than that provided for in the MCA to both professional and lay carers and the person who is subject to the deprivation of liberty in that:
  - (i) unlike the MCA, guardianship provides explicit legal authority to deprive a person of his or her liberty during conveyance from that person's home to the specified place of residence<sup>13</sup>;
  - (ii) unlike the MCA, guardianship provides explicit authority for the person to be returned to the specified place of residence in the event of the person leaving that place without authority<sup>14</sup>;
  - (iii) the responsible social services authority must arrange for a person under guardianship to be visited at intervals of not more than 3 months, and at least one such visit in any year shall be by a "section 12 doctor"<sup>15</sup>. No similar obligation is to be found in the MCA; and
  - (iv) the MHA provides a patient's nearest relative with powers with respect to guardianship that are intended to protect the position of the patient<sup>16</sup>. The nearest relative has no role to play under the MCA.

There would therefore appear to be no legal impediment to prevent guardianship being used to justify the deprivation of a patient's liberty in a care home in preference to the MCA procedure.

## Sectioning

New Schedule 1A to the MCA sets out the circumstances that prevent a person who is being deprived of his or her liberty from being the subject of the MCA procedure<sup>17</sup>. If Schedule 1A applies, the MHA must be used. However there is nothing in either the MCA or the MHA that prevents the MHA being used to justify a deprivation of liberty in a situation where Schedule 1A does not apply<sup>18</sup>. In this situation, either the MCA or the MHA can be invoked if the patient satisfies the appropriate criteria under either Act. The following factors provide strong support for exercising choice in favour of the MHA:

- Parts IV and IVA of the MHA provide patients with significant protections relating to the provision of treatment for the patient's mental disorder. The provision of such treatment to patients subject to the MCA is unregulated.
- The MHA provides a patient's nearest relative with protective powers relating to the patient's detention<sup>19</sup>. The nearest relative has no role to play under the MCA.
- A MHA patient has a right to make an application to a Mental Health Review Tribunal and his or her case will be referred to the tribunal if this right is not exercised<sup>20</sup>. The MCA provides for no automatic judicial oversight of the patient's detention.

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13 MHA s.18(7).

14 MHA s.18(3).

15 SI 1983/983, reg.13.

16 See, for e.g. s.11(4) and 23(2) of the MHA.

17 Sch.1A is considered by Robert Robinson in the May 2007 issue of this Journal at pp.35–37.

18 Confirmed by the "Draft Illustrative Code of Practice on the Bournewood safeguards", Department of Health, December 2006, para.86.

19 See footnote 16, above.

20 See Part V of the MHA.

- The MHA contains explicit authority for the applicant to “take and convey” the patient to the hospital named in the application<sup>21</sup> and for the hospital authority to return the patient to the hospital in the event of the patient absconding<sup>22</sup>. The MCA is silent on these points.
- MHA patients who are subject to s.117 of the Act receive after-care services provided under that section free of charge<sup>23</sup>. MCA patients who are discharged from hospital will be subject to a mandatory charging regime if they are placed in a care home<sup>24</sup> and a discretionary charging regime if they receive domiciliary care services<sup>25</sup>.

## Conclusion

MHA powers provide patients who are being subjected to a deprivation of liberty with a degree of protection that exceeds those contained in the MCA. If the approach outlined above is adopted, the MCA procedure need only be invoked for the small number of patients who are either being deprived of their liberty while being treated in hospital for a physical disorder or who require hospital treatment for a mental disorder but fail to satisfy the criteria for detention under the MHA<sup>26</sup>.

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21 MHA s.6(1).

22 MHA s.18(1).

23 *R. v Manchester City Council, ex p. Stennett* [2002] UKHL 34.

24 *National Assistance Act 1948*, s.22.

25 *Health and Social Services and Social Security Adjudications Act 1983*, s.17.

26 For e.g., a learning disabled patient who requires detention under s.3 but whose disability is not “associated with abnormally aggressive or seriously irresponsible conduct” (see s.2(2) of the 2007 Act).